form in which they were asked. As written, they were supported by abundant authority, much of which has been already cited, and were based upon the evidence in the case.

The judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with this opinion.

Reversed.

KEITH, P., absent.

CARTER v. HOOK.

Nov. 12, 1914.

[83 S. E. 386.]

1. Vendor and Purchaser (§ 22*)—Option Contract—Validity—Description.—An option contract to convey certain land described it as all those certain lands owned by the vendor and lying east of the center of a certain road extending from the main road leading from the "Rich Patch mines to Hays Gap" to the lands then owned by the vendee, "which were recently purchased by him from H.'s executor and east of the line running due north from the center of the road at a point that the same intersects with said main road, including all appurtenances situated thereon, consisting, in part, of the Rich Patch Post Office Building, one residence and stable, containing, it is estimated, about 300 acres, more or less." Held, that such description was not so indefinite as to render the contract unenforceable, a competent surveyor having testified that with the option as his sole guide he had gone on the land and had no difficulty in locating it, and that any person of reasonable intelligence whether a surveyor or not, would have no difficulty in definitely locating all the boundaries.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

2. Contracts (§ 10*)—Mutuality—Accepted Option.—An option contract to convey real estate after acceptance is not objectionable for want of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. Contracts (§ 59*) — Options—Acceptance—Consideration.—An option to convey land, though unsupported by a consideration, if accepted before it expires or is withdrawn, is an enforceable contract to convey, and is not objectionable for want of consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 348; Dec. Dig. § 59.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

4. Usury (§ 1*)—Defined.—Usury is a premium or compensation paid or stipulated to be paid for the use of money borrowed or returned, beyond the rate of interest established by law, so that whereever by the terms of a contract money is loaned and the lender is paid, or stipulated to be paid, a valuable consideration in excess of the rate allowed by law, the contract is usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, First and Second Series, Usury.]

5. Usury (§ 31*)—Contract to Convey Land—Unconscionableness.—Defendant being in urgent need of money applied to complainant for a loan of $1,000, which he at first declined. He, however, agreed to loan $1,100, secured by a deed of trust on certain land, defendant agreeing to sell the land for $4,000 in case the money was not paid. It was agreed that they should meet at the office of an attorney the next day and close the transaction. At the meeting, however, complainant declined to carry out his part of the transaction unless defendant, in addition to giving him an interest-bearing note for $1,100 and securing its payment by a deed of trust, would also execute to complainant a written option entitling him to purchase about 300 acres of defendant's land lying next to that owned by complainant, and worth between $8,000 and $9,000, for $3,600, and this defendant did. Held, that the option was not only part of a usurious transaction, but part of a hard and unconscionable bargain, and would not be specifically enforced in equity.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 74, 78-81; Dec. Dig. § 31.*]

Appeal from Circuit Court, Alleghany County.

Suit by E. L. Carter against S. E. Hook. Decree for defendant, and complainant appeals. Affirmed.

W. E. Allen, of Covington, and *O. B. Harvey,* of Clifton Forge, for appellant.

Geo. A. Revercomb and *John T. Delaney,* both of Covington, for appellee.

KEITH, P. This controversy grows out of a bill for specific performance, filed by E. L. Carter against S. E. Hook in the circuit court of Alleghany county, in which he states that he entered into a contract with Hook on February 20, 1909, by which the defendant agreed to sell him, for the sum of $3,600, a certain tract of land in Alleghany county, Va., which was composed of more than one parcel. The bill goes on to describe the land in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the terms of the contract, which need not be set forth at large in this opinion. Continuing, the plaintiff avers, that "under the terms of said contract your complainant had a right to purchase said land on or before one year from the date of said contract, upon the tender to the party of the first part of the said option price of $3,600, and in the event that your complainant agreed to purchase said property within said 12 months, the defendant agreed to execute to him a sufficient deed, with general warranty of title, for said land;" that it was further provided in the contract that complainant loaned to the defendant, on the date of said contract, the sum of $1,100, secured by a deed of trust on the land aforesaid and other lands belonging to the said defendant, and further provided that the sum of $1,100 and all interest that had accrued thereon might be deducted from the said sum of $3,600 to be paid for the land aforesaid, and further provided that if the option to purchase was exercised within one year from the date of the said contract, the possession of the said land, including all crops thereon, should remain in the defendant until one year from the date of said contract. The bill then avers that some time before the 12 months given him in said option contract complainant notified the said defendant that he desired to purchase said property, and tendered him the $3,600 which he was to pay therefor, less the $1,100, with interest thereon to that date, and that the defendant promised him that he would execute the deed in accordance with his contract, but up to the time of the institution of this suit has failed and refused to make such deed. The bill alleges that complainant has complied with every provision of said option contract, and that he knows of no reason why the defendant refused and neglected to comply with his part of the contract.

The bill further avers that at the time the contract was entered into $3,600 was all that the defendant asked, and that it was a fair price for the land. It further appears from the bill that there was another deed of trust in addition to that of the complainant upon the land, but the complainant offered to loan the defendant a sufficient sum of money in addition to the $3,600 to pay off this deed of trust and release the lien on the land, and he is still willing to lend the defendant such sum of money on any reasonable length of time, so that he may be in a position to release the lien of the deed of trust on that portion of his land which he agreed to sell to complainant as aforesaid.

The prayer of the bill is that a commissioner may be appointed for the purpose of making a proper deed of conveyance after payment into court of the said $3,600, less $1,100 with proper interest, and that the court will grant such other and general relief as the case may require.

Hook filed his demurrer and answer to this bill, and for

grounds of demurrer states that the description of the land in the bill mentioned is so vague, indefinite, and uncertain that it cannot be accurately and positively located, and that therefore the alleged contract is not susceptible of specific enforcement; that the alleged option contract not only fails to show upon its face that any consideration deemed valuable in law was received by respondent for his execution thereof, but that it affirmatively appears from the same that it was executed without any good, legal, and valuable consideration to respondent, and that therefore the same is nudum pactum; that the alleged option contract shows upon its face that respondent had no right to enforce it, and that therefore, there is a lack of mutuality, and the alleged contract is not enforceable by the plaintiff; and that, as appears from the said bill of complaint, the plaintiff has a full, adequate, and complete remedy at law.

Further answering defendant avers that the tract embraced in the option contract contains about 300 acres, which was worth, at the very least, at the date of the contract, between $7,500 and $9,000, and that the price of $3,600 placed upon it in the alleged option contract is grossly and unconscionably inadequate, and that:

"The plaintiff well knew that the said price of $3,600 was grossly inadequate, but that, knowing the dire pecuniary necessities of respondent, the said plaintiff took advantage thereof, and harshly and unconscionably oppressed him and caused him, not only to bind himself to pay him for the loan of $1,000 interest at the rate of 16 6/10 per cent., but to also bind himself to agree to sell him for $3,600 a tract of land, the then minimum value of which was from $7,500 to $9,000. Respondent is advised that by reason of the gross and unconscionable inadequacy in price and of the inequitable conduct of the plaintiff, whereby he secured the execution of the said alleged option contract by respondent, the said alleged contract is not enforceable in a court of equity."

Upon the pleadings depositions were taken, the case came on to be heard before the circuit court, which dismissed the complainant's bill, and to that decree an appeal was awarded.

[1] We do not think that the appellee has maintained his defense with respect to the insufficiency of the description. There is some contrariety of opinion among the surveyors, but we think that the preponderance of the evidence is that the description is sufficient. The land is described as follows:

"All those certain lands now owned by the party of the first part that lie east of the center of that certain road that now extends from the main road leading from the Rich Patch mines to Hays Gap to the lands now owned by the said E. L. Carter, which were recently purchased by him from Andrew Harmon's

executor, and east of a line running due north from the center of said road at a point that the same intersects with said main road, including all appurtenances situated thereon, consisting, in part, of the Rich Patch Post Office Building, one residence and stable, containing, it is estimated, about 300 acres, more or less."

It is claimed that that part of the description which reads, "east of a line running due north from the center of said road at a point that the same intersects with said main road," etc., is indefinite, the contention being that there was no northern termination named; that this was the line which was to divide the property of the defendant, and the option covered all of his land east of said line, but did not cover the land of the defendant west of said line. We think it is shown by the contract that the clear intention of the parties was to divide the property by running a line due north across the property to the outside boundary of defendant's land, and in accordance with that view Williams, who appears to be a competent surveyor, testified that with the option as his sole guide he had gone upon the land and had no difficulty in locating it, and that any person of reasonable intelligence, whether a surveyor or not, would have no difficulty in definitely locating all its boundaries.

[2] Nor do we think that the appellee has maintained his defense of want of mutuality in the contract.

In Pomeroy on Specific Performance, § 169, it is said:

"Whenever a contract is of such a form and nature that it contains mutual executory promises, or whenever it is intended that it should require future acts or omissions from each of the parties, and that each should be bound to such acts or omissions by express undertakings, then, in all such agreements, there must be both the mutuality of obligation and of remedy; but when it was intended that the contract should, in its express terms, be binding upon one of the parties alone, it may be specifically enforced against that party, although the remedy cannot be granted to him against the promisee."

And, speaking of option contracts, in the same section the author says:

"Contracts of this kind are, in reality, condition-agreements. Upon the happening of the condition—that is, upon making the request, giving the assent, or declaring the option—they become absolute, and in many instances mutual in their obligation."

[3] Nor do we think that the defense that the contract was without valuable consideration can avail appellee.

"It is now universally held that when an option is accepted, no other element entering in, it becomes an executory contract for the sale of the property, with mutuality of obligation and remedy. And the acceptance of the option in the manner and

within the time specified is sufficient to bind both parties; and removes any objection to the enforcement of the agreement based thereon for want of consideration. The option so given may or may not be supported by a sufficient consideration. If it is not so supported, the offer is a mere gratuity which may be withdrawn at any time before its acceptance. But if an option unsupported by a consideration is accepted before it expires or is withdrawn, a binding contract is thus formed. And if the offer to sell is supported by a sufficient consideration, it cannot be withdrawn prior to the expiration of the time specified." 1 Elliott on Contracts, § 232; Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986; Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880.

This brings us to a defense which is, we think, decisive of the controversy. The appellee, Hook, was under necessity to raise money, of which he was in urgent need. He applied to Carter for a loan, according to his account, of $1,000, for which he agreed to execute his note, bearing interest at the rate of 6 per cent., for $1,100, and to secure the payment thereof by deed of trust, and if the note was not paid at maturity, to sell to him at the price of $4,000 a certain portion of his land adjoining that owned by Carter; that Carter verbally accepted this proposition, and it was agreed that on the next day they would meet at the office of Mr. Parish, an attorney, and close the transaction; that when the verbal agreement of the preceding day was about to be reduced to writing, Carter declined to carry out his part of it, and refused to make the loan of $1,000 to appellee unless, in addition to the appellee giving him his interest-bearing note for $1,100 and securing its payment by a deed of trust, he would also give to Carter a written option at the price of $3,600, to buy a portion of his land; and that in the dilemma in which he was thus placed by Carter's refusal to carry out his agreement of the preceding day, appellee executed the option contract which Carter is now seeking to have specifically enforced. Carter, on contrary, insists that he actually loaned and advanced to Hook the full sum of $1,100, the repayment of which, with interest at 6 per cent., was to be secured by deed of trust upon Hook's lands, and also entered into the option contract set out in the bill, by the terms of which Carter obtained an option upon 300 acres of land for $3,600, the option contract providing that the $1,100, with all interest that had accrued thereon, should be deducted from the $3,600 to be paid for the land, if the option to purchase was exercised within one year from the date of the contract, and that within the 12 months he notified the defendant that he desired to purchase the property, and tendered to him $3,600, less the $1,100, with interest to date.

We are of opinion that the evidence tends to establish appellant's statement of facts with regard to this transaction, and maintains Carter's claim that he advanced the full sum of $1,100 to Hook; but we do not think that upon the whole record the appellant has shown, as he was bound to show, that the contract, of which he is seeking the enforcement was fair, equal, and just. On the contrary, we are of opinion that it was harsh and unconscionable. Hook was, as we have seen, in urgent need of money. He sought a loan from Carter, and received, as we think the evidence shows, $1,100, for the payment of which, with legal interest at 6 per cent., he was to execute a deed of trust upon his lands. Now the return of the loan at 6 per cent. was all that Carter had a right to demand of Hook, but it was not all that he received, for in addition to the legal rate of interest he was to acquire a right to purchase 300 acres of land at the price of $3,600. The evidence in the record shows that this land was worth $30 an acre, or, as Hook himself states, from $8,000 to $10,000, and this estimate is supported by a great preponderance of the evidence, so that, as a part of the contract for the loan of the money, Carter was to receive the full legal rate of interest, plus a right to purchase for $3,600 land which was valued at nearly three times that sum. That it was all part of the original transaction culminating in the loan of the money is put beyond the reach of controversy by Carter's own testimony, in which he was asked:

"State, Mr. Carter, your real reason for loaning Mr. Hook this money.

"A. Mr. Hook came to me to borrow this money, and I told him I couldn't loan him the money; then he wrote to me again and told me he would give me an option on that 300 acres of land if I would loan him money. I loaned him the money in order to get the option."

The controlling influence, therefore, inducing Carter to make the loan was not the remuneration which the law approves, but an option for the purchase of a valuable tract of land to which Hook's necessities, but not his will, consented.

[4] Usury is defined in the second edition of Black's Law Dictionary as being:

"A premium or compensation paid or stipulated to be paid for the use of money borrowed or returned, beyond the rate of interest established by law."

Wherever, therefore, by the terms of a contract, money is loaned and the lender is paid, or stipulates to be paid, a valuable consideration in excess of the rate allowed by law, the contract is usurious.

In Stribbling *v.* Bank of the Valley, 5 Rand. (26 Va.) 132, it was held, that:

"When a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive stock at a price much above the market value, to make up the deficiency, and the bargain is made on these terms, such contract is usurious."

That case came again before the Court of Appeals in Bank of Valley *v.* Stribbling's Ex'r, 7 Leigh (34 Va.) 26, where it was held that where there was a sale of stock at an exorbitant price, coupled with a loan of money, arising out of a proposition to borrow money, the sale and the loan constituting one entire contract, inseparably connected with each other, and the one made dependent upon the other, the transaction was usurious.

[5] The principle of the cases just cited is precisely applicable to the one under consideration. In those cases the loan was made on condition that the borrower should purchase stock owned by the lender at a price much above the market value, while in the case before us the loan was made upon condition that the borrower should sell a farm to the lender at about 40 per cent. of its actual value. If such a contract was sanctioned by this court, it would ingraft a dangerous principle upon the law of usury. It would enable the lender to say:

"You have a horse, a jewel, or a farm, which I crave, and in return for his loan you must pay me 6 per cent. interest, as allowed by law, and give me an option upon that I covet."

Upon the whole case, we are of opinion that the decree of the circuit court should be affirmed.

Affirmed.

Note.

Enforcement of specific execution of contracts in a court of equity is not a matter of right in either party but rests in the sound discretion of the court as governed as far as may be by general rules and principles. When these rules will not furnish any exact measure of justice between the parties, the court will grant or refuse relief according to the circumstances in each case. As said in Gachet *v.* Morton, 61 So. 817. "The right to specifically enforce the performance of a contract is not absolute. Its enforcement in a measure, at least, rests in the sound discretion of the court, a judicial discretion, of course, to be exercised according to the principles of equity. It has been held that contracts which will be thus enforced must be fair, must be reasonable, and must be just, and not attended with excessive hardships or injustice. Courts of equity have frequently refused to enforce contracts when it appeared that they were founded on mistake or surprise to such an extent that their enforcement would be inequitable." Tombigbee Co. *v.* Fairford Co., 155 Ala. 575, 47 South. 88.

Inadequacy of price standing alone and free from taint of fraud or unreasonableness is not in itself a defense to an action to specifically enforce a contract.

"Although inadequacy of consideration in contracts of sale, either in the price or property sold, may be a ground of defense, yet the

facility of contracting and the free exercise of the judgment and will of the parties require that, as a general rule, they should be sole judges of the value of the benefits to be derived from their bargains. It is therefore manifestly just and expedient that mere inadequacy of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract or a cause to set it aside.. And such is now the rule; for courts of equity, as well as courts of law, act upon the ground that every person who is not, from the peculiar condition and circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon. The reason of this is to be sought in the extreme difficulty of judging as to the feelings and motives which may have actuated the parties, and the corresponding variety of opinions which may be formed with reference to the sufficiency of the consideration." South & North Ala. R. Co. *v.* Highland Ave. & B. R. Co., 98 Ala. 400, 13 So. 682, 684.

When, however, inadequacy of price is of such degree as to amount to conclusive evidence of fraud or is so unfair, unreasonable or inequitable that its enforcement would work a hardship and manifest injustice to one of the parties, a court of equity will refuse to specifically enforce it and leave the parties to their remedies at law.

There has been some conflict in the cases as to the sufficiency of inadequacy of price as a defense to a suit for specific performance. This conflict however, arises generally from a confusion of the doctrine of inadequacy of consideration when applied in suits to rescind contracts and when made as a defense of suits for specific performance. That the inadequacy of consideration may be insufficient to sustain a suit to rescind a contract and yet may justify the court in the refusing to decree a specific performance of it, is well-settled.

Chief Justice Marshall, in considering this subject in Cathcart *v.* Robinson, 5 Pet. 264, 8 L. Ed. 120, said: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. * * * It is soid that the plaintiff must come into court with clean hands; and that a defendant may resist a bill for specific performance, by showing that, under the circumstance, the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation, or any unfairness—are enumerated among the causes which will induce the court to refuse its aid. * * * If to any unfairness a great inequality between price and value be added, a court of chancery will not afford its aid."

Caldwell, Ch., in Gasque *v.* Small, 2 Strobh. Eq. 72, referring to this question, said: "The inadequacy must not be measured by grains, but it ought to be palpably disproportioned to the real and market value of the property, so as to constitute a hard, unreasonable, and unconscionable contract; but it is not necessary that it should be so gross as to excite an exclamation, or to indicate imposition, oppression, or fraud, for this would be sufficient ground not only for refusing a specific performance, but for rescinding the contract." (Specific performance of contract to convey real estate for less than one half its value refused.)

See, also, Christian *v.* Ransome, 46 Ga. 138 (specific performance of contract to convey real estate worth $2,000 for real estate worth

only $1,000 refused); Gasque *v.* Small, 2 Strobh. Eq. 78 (specific performance of contract to convey real estate at about one half its real value refused); Hodgson *v.* Farrell, 15 N. J. Eq. 88 (execution sale of property worth $1,200 for $400); Grizzle *v.* Sutherland, 88 Va. 584, 14 S. E. 332 (contract to sell land for about 10 per cent of its value.)

Our own court has laid down the doctrine that to justify a court of equity in refusing specific performance to enforce a contract for inadequacy of consideration, such inadequacy must be so gross as to amount to evidence of fraud.

In Stearns *v.* Beckam, 31 Gratt. 389, the court says, "the unfairness which will disentitle a plaintiff to call for specific performance at the hands of a court of equity, may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made. The unfairness may not amount to actual fraud; for there are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which are essential in order that the court may exercise its extraordinary jurisdiction in specific performance. * * * Inadequacy of consideration, unconnected with any other circumstance, constitutes no valid objection to the specific execution of a contract through the medium of a court of equity unless the inadequacy be so great as in itself to be sufficient evidence of fraud." See also, Terry *v.* Coles, 80 Va. 700; Hale *v.* Wilkinson, 21 Gratt. 75.

In White & Wife *v.* McGannon & al., 29 Gratt. (Va.), 511, the court held that though it appears that the price contracted to be given for the land was double its value, yet as the purchaser was fully competent to contract, and there was no fiduciary relationship between him and the vendor, and very brief acquaintance, and the purchaser made his own examination of the land, though it was mostly covered by snow; in the absence of all fraudulent representations on the part of the vendor the contract will be enforced.

BUCK *v.* COMMONWEALTH.

Nov. 12, 1914.

[83 S. E. 390.]

1. Criminal Law (§ 752*)—Testimony of Accused—Weight—Demurrer to Evidence.—Where accused testified in his own behalf and his evidence was not contradicted nor in conflict with any other evidence, he was entitled to have it accepted as true on a demurrer to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1725, 1726; Dec. Dig. § 752.*]

2. Escape (§ 7*)—Persons Liable—"Accessory After the Fact."—One cannot be convicted as an "accessory after the fact" in an escape, unless what he did was done by way of personal help to his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.